1403

SUPREME COURT OF THE UNITED STATES.

No. 119.

JAMES A. ABBOTT and HANNAH K., his wife, Demandants and Pl'ffs in Error,

vs.

THE ESSEX COMPANY, Tenants.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE DISTRICT OF MASSACHUSETTS.

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UNITED STATES OF AMERICA,
Massachusetts District:

At a Circuit Court of the United States begun and holden at Boston, for the First Circuit and District of Massachusetts, on Monday, the sixteenth day of October, in the year of our Lord one thousand eight hundred and fifty-four, the fifteenth day of said month being Sunday, before the Honorable Benjamin R. Curtis, Associate Justice; Peleg Sprague, District Judge:

JAMES A. ABBOTT of Nashua, in the County of Hillsboro' and State of New Hampshire, counsellor at law, and a citizen of said State of New Hampshire, and HANNAH KITTREDGE ABBOTT, his wife, *vs.* THE ESSEX COMPANY, a corporation created by the Commonwealth of Massachusetts, resident and doing business within said Commonwealth of Massachusetts:

In a plea of land, wherein they demand in right of the said Hannah Kittredge Abbott a certain piece of land with the appurtenances, situate in Lawrence, in the County of Essex, and Commonwealth of Massachusetts, and of more than the value of two thousand dollars, and described as follows, to wit: the said land is situated on the west side of the Shawsheen river in said Lawrence, and on the westerly side of the road running from Dean Chickering's house to Moses Town's, and bounded as follows: Beginning at said road and land recently of Henry Poor, nearly opposite the Granger House, so called; thence by land formerly of said Poor, south four and a half degrees, west eighty-three rods and twenty-one links, across the Salem turnpike, to land formerly of Samuel Stevens, second, and heirs of Andrew Peters; thence by said Peters' land north seventy-three and a half degrees, west forty rods; thence north sixty-nine and three-fourths degrees, west thirteen rods and twenty-two links, to land of Isaac Tompkins; thence the same course by said Tompkins' land, twenty-one rods and three links to land recently of Phineas Stevens; thence by said Stevens' land north twenty-five degrees, east twenty-two rods and eighteen links; thence by said Stevens' land north seventy-one degrees, west twenty-one rods and seventeen links; thence north six degrees, east seventy-six rods and eight links, across said turnpike, and by land of Moody Bridges to the road first mentioned; thence by the road first mentioned south sixty-one degrees, east seventy rods and eleven links; thence by said road south fifty degrees, east seventeen rods to the first bound: said parcel contains forty-three acres and one hundred and fifty-six rods, be the same more or less, of which the Essex Company unjustly and without judgment disseized them within twenty years now last past, as it is said; and thereupon the said James A. and Hannah Kittredge Abbott say, that within twenty years now last past they were seized

of the land aforesaid, with the appurtenances, in their demesne as of fee in right of the said Hannah Kittredge Abbott, taking the profits thereof to the value of ten dollars by the year, and of which the said Essex Company disseized them as aforesaid, to the damage of the said James A. and Hannah Kittredge Abbott, as they say, to the amount of one thousand dollars.

This action was entered at the May Term of this Court, A. D. one thousand eight hundred and fifty-four, when and where the parties appeared by their respective counsel, and thence the same was continued until the present term of this Court. And now the said Essex Company, by their attorney, E. Merwin, come and defend their right when, &c., and say that they did not disseize the plaintiffs in manner and form as they in their writ aforesaid have supposed, and of this they put themselves upon the country for trial; and the plaintiffs, by their attorney, S. Bartlett, do the like.

Issue being thus joined, the cause, after a full hearing, is committed to a jury, sworn according to law to try the same, who, under the direction of the Court, return the following verdict: The jury find that the said Essex Company did not disseize the said plaintiffs and demandants in manner and form as they in their writ aforesaid have declared against them. Whereupon it is considered by the Court that the said Essex Company recover against the said James A. Abbott and Hannah Kittredge Abbott costs of suit, taxed at —

Upon the trial of the above entitled cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the plaintiffs filed their bill of exceptions, which was allowed by the Court, and is in the words and figures following, to wit:—

UNITED STATES OF AMERICA,
Massachusetts District:

October Term, 1854.

JAMES A. ABBOTT *et ux.*
vs.
THE ESSEX COMPANY.

Bill of Exceptions.

Be it remembered that at a term of a Circuit Court of the United States for the First Circuit, holden at Boston, within and for the District of Massachusetts, on the fifteenth day of October, eighteen hundred and fifty-four, by the Honorable Benjamin R. Curtis, Circuit Judge, came James A. Abbott and Hannah Kittredge Abbott, his wife, of Nashua, in the State of New Hampshire, and citizen of said State of New Hampshire, and by a writ of entry declared against the Essex Company, a corporation created by the Commonwealth of Massachusetts, resident and doing business within said Commonwealth of Massachusetts, as by the writ and declaration of record

will appear, to which the defendant pleaded the general issue, that it did not disseize the demandants in manner and form as in said writ and declaration is set forth; which issue was joined by the said demandants: and thereupon came on for trial before said Circuit Court at said October Term, before a jury empanelled for that purpose; and the said demandants, to maintain and prove the issue on their part, submitted to the Court the will of John Kittredge, which was as follows, to wit:—

In the name of God, amen. I, John Kittredge, of Andover, in the county of Essex and province of the Massachusetts Bay, in New England, surgeon, being, through Divine goodness, favored with the due exercise of my understanding, have great cause, and accordingly I return thanks to Almighty God therefor; but being exercised with such bodily indisposition as gives me reason to think that my continuance in life is but short, I have, therefore, thought proper to discharge my mind of all worldly concerns, as far as possible, to the end that I may spend the remainder of my days in preparation for futurity; for which purpose I make this my last will and testament, whereby I dispose of my worldly goods and estate as followeth, viz:—

Imp's. I give to Sarah, my well-beloved wife, the one-third of all my lands and buildings in Andover aforesaid, and the one-third of all my household goods and furniture, to be for her use and improvement so long as she remains my widow.

Item. I give to my son, Benjamin Kittredge, of Tewkesbury, in the county of Middlesex, the sum of twenty shillings, lawful money, and the reason I give him no more is that I have given him his portion out of my estate some time before.

Item. I give to my son, Thomas Kittredge, all the land I own lying in a place known by the name of Ox Common, in said Andover, which, with what I have given him, my said son Thomas, completes his full proportion of my estate.

Item. I give to my two sons, namely, John and Jacob Kittredge, all my lands and buildings in Andover aforesaid (excepting the land I gave to my son Thomas aforesaid), which buildings consist of dwelling-houses, barns, corn-house, grist-mill, and cider-mill, all of every denomination; also, all my live stock of cattle, horses, sheep, and swine, and all my husbandry utensils of every denomination, and all my tools that may be useful for tending the mills aforesaid; and also all my bonds and notes of hand and book accounts, together with what money I may leave at my decease; and my wearing apparel, I give the same to my said sons, John and Jacob Kittredge, to be equally divided between them; and in consideration of what I have given my said sons John and Jacob Kittredge, the executor of this testament (hereinafter named) is hereby ordered to see that all my just debts and funeral charges, together with all the legacies in this will mentioned, be paid out of that part of my estate I have given to my two sons, John and Jacob Kittredge, to whom I give each one bed and bedding.

Item. It is my will, that if either of my said sons, namely, John and Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.

Item. I give to my granddaughter, Molly White (daughter of Aaron White, of Medway, in the county of Suffolk), the sum of fourteen pounds five shillings and two pence, lawful money; and the reason I give her no more is, I gave my daughter (mother of the said Molly White) at her marriage, as much as would make her, the said grandchild, with what I have now bequeathed, equal to my other daughters, which sum is to be paid her at the age of twenty-one years; but if she should see fit to marry before she arrives to that age, the same to be paid her at her marriage.

Item. I give to my granddaughter, Sarah Dwinnel, the sum of sixty pounds, lawful money, to be paid in the following manner, viz: twenty pounds to be paid her as soon as she arrives to the age of twenty-one years; but if she should see fit to marry before the age of twenty-one years, the same sum of twenty pounds to be paid her, and the remainder to be paid in three years after she arrive to the age of twenty-one, with lawful interest for the same till paid; and I also order her, the said Sarah Dwinnel, to be maintained out of that part of my estate I give to my sons, John and Jacob Kittredge, until she arrives to the age of eighteen years.

Item. I give to my daughter, Elizabeth Kittredge, the sum of fifty-three pounds, six shillings and eight pence, lawful money, of which sum thirteen pounds, six shillings and eight pence is to be paid her at my decease, and the remainder to be paid her in four years after, with lawful interest for the same till paid.

Item. I give to my daughter, Hannah Kittredge, the sum of sixty pounds, lawful money, twenty pounds to be paid her when she arrives to the age of twenty-two years (except she should marry before she arrives to the age of twenty-two years), then the said twenty pounds to be paid her, and the remainder to be paid in three years after, with interest for the same till paid. I also give her my best bed and furniture.

Item. I give to my daughter, Susanna Kittredge, the sum of sixty pounds, lawful money, twenty pounds to be paid her when she arrives to the age of eighteen years, and the remainder in five years after, with interest for the same till paid.

Item. I give to my three daughters, namely, Elizabeth, Hannah, and Susanna Kittredge, the remainder of my household goods and furniture (excepting wet and dry cash), and also the one-third which I gave Sarah, my aforesaid wife, or what of the same may remain at her decease or marriage; all of which is to be equally divided amongst them, my above said daughters. I also give to them, my said daughters, the privilege of living in my house for so long as they shall live a single life, and the liberty of keeping a cow and one swine on the

produce of my land I have given to my two sons, John and Jacob Kittredge.

Item. It is my will, that if either of my daughters or granddaughters aforenamed should die and leave no lawful issue, then, what I have given to either of them should be equally divided amongst my surviving daughters or their heirs.

Item. I give to my said sons, John and Jacob Kittredge, my wet and dry cash, and also my pew in the North Meeting-house in Andover, aforesaid, to be equally divided between them, they to allow my aforesaid wife and daughters to sit in said pew as long as they live unmarried.

And if there is any of my estate that I have not disposed of in this will, either real, personal, or mixed, of what name or nature soever, I give the same to my aforesaid sons John and Jacob Kittredge.

Lastly. I do hereby constitute and appoint my aforesaid son, John Kittredge, the sole executor of this my last will and testament, allowing this and no other to be so.

In witness whereof I, the said John Kittredge, have hereunto set my hand and seal, this twentieth day of September, Anno Domini one thousand seven hundred and seventy-five, and the fifteenth year of His Majesty's reign.

JOHN KITTREDGE. [SEAL.]

Signed, sealed, published and declared by the said John Kittredge to be his last will and testament, in presence of

ABRAHAM SAFFORD.
JOHN FRYE, JUNR.
BENJ. STEVENS, 3D.

[SEAL.] To all to whom these presents shall come, Benjamin Greenleaf, Esq., Judge of the Probate of Wills, &c. in the county of Essex, within the province of the Massachusetts Bay, in New England, sendeth greeting:

Know ye, that on the fifth day of August, Anno Domini 1776, the instrument afore written (purporting the last will and testament of John Kittredge, late of Andover, in said county, surgeon, deceased), was presented for probate by John Kittredge, the executor therein named, then present Abraham Safford and Benjamin Stevens, 3d, two of the witnesses thereto subscribed, who made oath, that they saw the said testator sign, seal, and heard him declare the said instrument to be his last will and testament, and that they, the said Abraham and Benjamin, with John Frye, Jun'r, subscribed their names together, as witnesses to the execution thereof, in the said testator's presence, and that he was then (to the best of their judgment) of sound and disposing mind.

I do prove, approve and allow of the said instrument as the last will and testament of the before-named deceased, and do commit the administration thereof in all matters the same concerning, and of his

Item. It is my will, that if either of my said sons, namely, John and Jacob Kittredge, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs.

Item. I give to my granddaughter, Molly White (daughter of Aaron White, of Medway, in the county of Suffolk), the sum of fourteen pounds five shillings and two pence, lawful money; and the reason I give her no more is, I gave my daughter (mother of the said Molly White) at her marriage, as much as would make her, the said grandchild, with what I have now bequeathed, equal to my other daughters, which sum is to be paid her at the age of twenty-one years; but if she should see fit to marry before she arrives to that age, the same to be paid her at her marriage.

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produce of my land I have given to my two sons, John and Jacob Kittredge.

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And if there is any of my estate that I have not disposed of in this will, either real, personal, or mixed, of what name or nature soever, I give the same to my aforesaid sons John and Jacob Kittredge.

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JOHN KITTREDGE. [SEAL.]

Signed, sealed, published and declared by the said John Kittredge to be his last will and testament, in presence of

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JOHN FRYE, JUNR.
BENJ. STEVENS, 3D.

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I do prove, approve and allow of the said instrument as the last will and testament of the before-named deceased, and do commit the administration thereof in all matters the same concerning, and of his

estate whereof he died seized and possessed in said county, unto John Kittredge, the before-named executor, well and faithfully to execute the said will and to administer the estate of the said deceased according thereto, who accepted of his said trust and is to give in an inventory in three months from the date hereof; and he shall render an account (upon oath) of his proceedings when thereunto lawfully required.

In testimony whereof, I do hereunto set my hand and seal of office the day and date above mentioned.

B. GREENLEAF,
J. Proba.

DANL. NOYES,
Reg'r.

A true copy of Record.
Attest, GEO. R. LORD, *Register.*

It was admitted by the parties, that said testator died in the year seventeen hundred and seventy-five; that his will was duly proved August 5th, 1776; that his two sons, John Kittredge and Jacob Kittredge, survived him; that said John Kittredge died in the year 1826, never having been married; that said Jacob Kittredge died in the lifetime of his brother John, on July 15th, 1807, leaving the following children, viz: John Kittredge, his oldest child, who died, without ever having had issue, on the tenth of January, 1823; Jacob Kittredge, his next oldest child, who died December 18th, 1831, having had issue one child, who is the demandant, Hannah Kittredge Abbott; Thomas W. Kittredge, his next child, who is now alive; Hannah Kittredge, his next child, who died, intestate, on the 28th October, 1815, never having had issue; George W. Kittredge, his next child, who died July 4th, 1836, intestate, having had issue one child, Jacob Kittredge, who is now alive, and William H. Kittredge, his last child, who died, intestate, on the first of October, 1849, never having had issue. The marriage of the demandants was also admitted, and that the surviving son of Jabob Kittredge, the devisee named in said will, and also his surviving grandchild, had before the commencement of the suit, released and conveyed to demandants all their interest and title in the demanded premises.

The demandants thereupon submitted, and requested the Judge to instruct the jury, that by the said will of John Kittredge, his two sons John and Jacob, therein named, took and became seized as to the real estate therein devised to them in equal moieties of an estate tail general, with cross remainder in fee simple, it being material and necessary to enable the demandants to maintain the issue on their part, to prove that estates tail as aforesaid were so devised by the said will. But the Judge refused so to instruct the jury, but did instruct them, that under said will, the testator's said sons John Kittredge and Jacob Kittredge took and became seized of an estate in

fee simple, and that the share of the one of the said sons who should first die without issue in the lifetime of the other of said sons, would in that event go over to said other son by way of executory devise.

Whereupon the Counsel of the demandants did then and there except to the said ruling and instruction of the Judge, and thereupon the jury did return their verdict, that the tenant did not disseize the demandants in manner and form as alleged in the writ and declaration.

And inasmuch as the matters referred to, and said rulings and instructions of the Court so objected to, do not appear by the record of the verdict aforesaid, the counsel on the part of the demandants prayed the Honorable Court to set their seal to this Bill of Exceptions, containing the several matters proved, admitted, and given in evidence, and the rulings and instructions of His Honor, the Judge, thereupon, and the exceptions thereto; all which being found to be true, are allowed.

In witness whereof I have hereunto set my hand and seal.

B. R. CURTIS, [SEAL.]
Associate Justice of the Sup. Ct. U. S.
assigned to the First Circuit.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, Henry W. Fuller, Clerk of the Circuit Court of the United States for the First Circuit and District of Massachusetts, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of

JAMES A. ABBOTT *et uxor*
versus
THE ESSEX COMPANY.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Boston, in said District, this fifth day of December, in the year of our Lord one thousand eight hundred and fifty-four, and of the Independence of the United States of America the seventy-ninth.

[SEAL.] H. W. FULLER,
Clerk.

UNITED STATES, ss:

[SEAL.] The President of the United States to the Judges of the Circuit Court holden in and for the District of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between James A. Abbott, of Nashua, in the State of New Hampshire, a citizen of

said State of New Hampshire, and Hannah Kittredge Abbott, his wife, demandants, and The Essex Company, a corporation created by the State of Massachusetts, resident and doing business therein, tenants and defendants, in a plea of land, a manifest error has intervened to the great damage of the said James A. Abbott and Hannah K. Abbott, as in their complaint has been stated: and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the Associate Justices of the Supreme Court of the United States on the first Monday of December next at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Allowed by P. SPRAGUE,
Judge of the U. S. Court, Mass. Dist.

Witness the Honorable Roger B. Taney, Esquire, Chief Justice of the said Supreme Court at Washington aforesaid, this first day of November, in the year of our Lord one thousand eight hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

H. W. FULLER,
Clerk.

UNITED STATES OF AMERICA.
CIRCUIT COURT OF THE U. S.,
Massachusetts District, ss:

I, Henry W. Fuller, Clerk of the Circuit Court of the United States for the First Circuit within and for the District of Massachusetts, in pursuance of the command contained in this writ of error, do make return thereof, and annex hereto, and transmit herewith a true copy of the entire record, and of all the proceedings in the cause or suit, wherein James A. Abbott and Hannah F. Abbott, his wife, are demandants, and The Essex Company are tenants and defendants, wherein judgment was rendered in our said Circuit Court.

I also annex the citation served by acknowledgment of def'ts, upon the issuing of said writ of error, a copy of which writ has this day been lodged in the said Clerk's Office by the pl'ff's in error for the adverse party.

In testimony whereof, I have hereunto set my hand, and the seal of said Circuit Court of the United States, this first day of November, A. D. eighteen hundred and fifty-four.

[SEAL.] H. W. FULLER,
Clerk.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,
Massachusetts District, ss:

To the Essex Company, a corporation established by the [SEAL.] laws of the State of Massachusetts, and doing business in said State, greeting:

You are hereby cited and admonished to be and appear before the Chief Justice and the Associate Justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the National Government, then and there to make answer to a writ of error this day sued out of the Clerk's Office of the Circuit Court of the United States, Massachusetts District, wherein James A. Abbott, of Nashua, in the State of New Hampshire, a citizen of said State of New Hampshire, and Hannah Kittredge Abbott, his wife, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this first day of November, A. D. one thousand eight hundred and fifty-four.

P. SPRAGUE,
Judge of the United States for the District of Massachusetts.

MASSACHUSETTS, ss:

The Essex Company, to whom this citation is addressed, hereby acknowledge service thereof upon them, this day made, and that they have received a true copy and full notice thereof.

The ESSEX COMPANY,
By E. MERWIN,
their Att'y.

BOSTON, *Nov.* 1*st*, 1854.

Filed 8 Dec., 1854.